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SOVEREIGN DEBT SYMPOSIUM

Sovereign Debt Restructuring – In the Machine Room of Legal Engineering

MATTHIAS GOLDMANN — 13 February, 2017

The authors and editors of the special issue on sovereign debt restructuring are highly grateful to the contributors to this symposium on sovereign debt for their thought-provoking contributions. As I have highlighted in my initial post, this special issue is as much about improving the current practice of sovereign debt restructuring as it is about legal engineering – in this case, about instigating incremental progressive development in a crucial policy area that requires international coordination, but is not very likely to see the timely adoption of an international treaty. The contributors raised too many issues to answer them all in a brief concluding post, and I admit that some of them deserve further thought. Instead of going through them one by one, I will focus on a few methodological issues in the following lines, which might also be of interest to those outside the small but rewarding field of sovereign debt.

Principles as the right type of norms?

The incremental approach taps the potential of legal scholarship for the progressive development of international law. This is nothing new – most of the fundamental concepts of the discipline originate in the works of legal scholars who distilled them from practice. Ideally, that requires scholarship to remain at equidistance from the Scylla and Charybdis of apology and utopia, as Ntina Tzouvala rightly observes. But our proposal for improving sovereign debt restructurings advocates to focus on principles, the most abstract types of legal concepts. This, argues Ntina, bears the risk of remaining overly general, lacking the granularity to address the specifics of each debt restructuring.

I agree with Ntina that such a risk exists and that it might compromise the effectiveness of the incremental approach. Nevertheless, principles might be advantageous for two reasons. First, the regulation of economic issues is fraught with uncertainty. General rules leave ample room to address developments that were not, and could not be, foreseen. It is perhaps better not to introduce strict rules like the now-ominous no-bailout rule in Art. 125 TFEU which crumble away at the first real test. Instead, principles set out a road for negotiations, for a structured decision-making process, without determining the exact coordinates of that road as it winds through changing territory.

Second, there is always the possibility that such broad principles develop and concretize as more and more roads begin to pervade the landscape, facilitating orientation. Domestic legislation and case law are the means to such concretization. This applies in particular to human rights. It is true, as Ntina recalls, that the rise of human rights has coincided with their virtual absence in the field of sovereign debt restructuring. But things do not need to remain like this. If conditionality follows a market logic that too

often than not prevails over social considerations, then bringing human rights into the equation might change the dynamics of the whole debate about conditionalities and lead towards greater concretization of human rights obligations in times of sovereign debt crisis.

Underreach and Overreach

However, international law principles might not reach each actor with a crucial role to play in sovereign debt restructurings. Régis Bismuth has reminded us of the large variety of actors who seem to stand in the second line, but might actually take decisions of huge significance for the entire debt restructuring process, such as the Financial Stability Board, credit rating agencies, and IOSCO. It seems bold to claim that their behavior can be regulated by principles of international law, as this might raise intricate questions of the responsibility of private and hybrid actors under international law. However, if the incremental approach is helpful in popularizing certain accepted standards, for example for the measurement of sovereign debt sustainability, reputational and market reasons might induce compliance by actors who are not strictly bound by such standards.

The opposite problem would consist in unintended consequences that overreach and create difficulties in other areas of international law. Régis cautions about the impact of the incremental approach on sovereign immunities, highlighting a case from France. While the UNCTAD Roadmap did not put particular emphasis on immunities, it is indeed a theoretical possibility that unintended consequences might arise for international law more generally, so the issue deserves closer study in the frame of a project aiming at legal reform. For example, it would be detrimental to international law if the skepticism about holdout litigation led to a general rollback of international dispute settlement. In this respect, the solution adopted for CETA, which exempts holdout litigation from the jurisdiction of the investment court, appears highly promising.

The perks and jerks of inductive reasoning

Principles in international law, whether general principles of law in the narrow sense or principles in the wider sense, rely on inductive reasoning from domestic or international law. Vassilis Paliouras usefully reminds us of the limits of quasi-analogical inductions from domestic law. Inter-creditor equity cannot mean the same with respect to sovereign debt as in the context of domestic bankruptcies. The gargantuan nature of modern sovereign debt crises, their tendency to spread across borders and sectors, and the fact that the state and other public actors work in the public interest, and cannot therefore be liquidated, all deserve to be kept in mind. For this reason, the proposed principles mainly take inspiration from the development of sovereign debt restructuring practice and its increasing focus on public interest, rather than domestic bankruptcy law.

Like Vassilis, Mauro Megliani cautions us against overly optimistic analogies, in this case good faith. He points out the scarcity of precedent where courts quashed holdout litigation because it violated good faith. There is no point in beating about the bush in that respect. However, the principal reason why I believe that good faith has a role to play is, as Mauro concedes, the emergence of sovereign debt sustainability as a principle. So why not invoke the latter principle as a bar to holdout litigation? While that would be a possibility, I believe there are certain advantages to good faith. Sovereign debt sustainability does not specify a procedure or a behavioral standard for confronting sovereign debt litigation. By contrast, a wealth of experience and precedents related to largely similar situations is stored in the principle of good faith. By extending the principle of good faith accordingly, one might deploy this rich resource for sovereign debt restructurings.

This, however, has already led me to the depth of the machine room of legal engineering.

Unlike real engineering, it does not resemble a mechanical process. Quite to the opposite, it requires a profound understanding of human behavior, political relationships, and law and economics in the field of sovereign debt restructurings. I am grateful to the contributors for broadening my understanding in these respects.

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